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IN THE

Supreme Court of the United States

RENATO P. MARIANI,

Petitioner,

—v.—

UNITED STATES OF AMERICA
and FEDERAL ELECTION COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Twenty-four years ago, this Court first considered the constitutionality of numerous provisions of the Federal Election Campaign Act ("FECA") in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). That case determined, among other things, that speech about elections was exempt from the FECA's restrictions so long as it did not expressly advocate the election or defeat of a candidate for federal office. In the years that followed, that holding led to the present-day distinction between "hard" and "soft" money which makes it illegal for corporations to make any contribution, however small, from their own funds to candidates for federal office while simultaneously permitting corporations to make unlimited soft-money donations to the same end. In this case, the district court, performing a statutorily established fact-finding role, held that the explosion of soft money in the electoral process has "essentially rendered the contribution and spending limits of FECA meaningless."

The petition raises the following questions:

1. Whether FECA's total ban on corporate contributions (2 U.S.C. § 441b (1994)) and conduit contributions (2 U.S.C § 441f (1994)) can be sustained, consistent with the First Amendment, when neither provision can be said to advance materially the government's proffered goals of preventing corruption or the appearance of corruption in the face of the soft-money loophole.

2. Whether a total ban on corporate contributions is consistent with the First Amendment.

3. Whether a court of appeals may refuse to give any deference to a district court's particularized findings of fact in a case brought under the extraordinary review provision of 2 U.S.C § 437h (1994).

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Petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 18, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 212 F.3d 761 and is set forth in the Appendix at 1a-28a. The findings of fact and the opinion of the district court are reported at 80 F. Supp. 2d 352 and are set forth in the Appendix at 29a-184a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 18, 2000. *See* Appendix at 1a. This petition is timely filed pursuant to 28 U.S.C. § 2101(c) (1994). This Court has jurisdiction over the action under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions of the United States Constitution and the Federal Election Campaign Act (as amended) are set forth in the Appendix at 196a-197a.

STATEMENT OF THE CASE

Procedural History

The litigation arises out of the criminal indictment of petitioner Renato P. Mariani ("Mariani") and others in the United States District Court for the Middle District of Pennsylvania. *United States* v. *Mariani*, No. 3:CR-97-

225 (M.D. Pa.). FOF 1-9 (App. 48a-51a).[1] According to the Indictment, Mariani and other officers of two corporations sought to make contributions to the 1996 presidential campaigns of Senator Robert Dole and President Bill Clinton, as well as to other candidates for federal office, by enlisting employees and others to forward contributions to the candidates that were thereafter reimbursed by one of the companies. FOF 2-3 (App. 49a-50a). The Indictment charged Mariani and his co-defendants with violations of two provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 441b and 441f. FOF 5 (App. 50a-51a). Section 441b prohibits any corporation from making any contribution in connection with any campaign for federal office and provides that it is unlawful for any officer of a corporation to consent to any prohibited contribution. FOF 7 (App. 51a). Section 441f of FECA prohibits the making of a contribution "in the name of another person." *Id.*

After the Indictment was filed, Mariani instituted this civil action against the United States pursuant to the unique certification procedures set forth in FECA, *see* 2 U.S.C. § 437h, challenging the constitutionality of §§ 441b and 441f as inconsistent with the First Amendment to the United States Constitution. Broadly stated, the Complaint avers that the soft money loophole that developed after (and in large part as a result of) this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), has eviscerated the campaign finance system originally envisioned by Congress, leaving in place a facade of limitations that simultaneously imposes criminal liability on those who seek to make political contributions directly to campaigns while establishing exemptions of

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[1] References to "FOF __ (App. __)" are to specific paragraph numbers of the district court's findings of fact set forth in its Memorandum Opinion of October 27, 1999, a copy of which is included in the Appendix ("App.") at 29a-184a.

such extraordinary breadth as to assure that the statute's purposes cannot be achieved. As regards corporations, the dichotomy is total: corporations may contribute *none* of their funds to candidates for federal office at the same time they may make *unlimited* donations of soft money that is then spent to benefit the campaigns of federal candidates. In an area of law in which the First Amendment looms large, the Complaint urges, such a criminal statute cannot be said to materially advance its proffered goals and must thus be held unconstitutional. Complaint at ¶¶ 32-33. Alternatively, the Complaint alleges, the total ban on corporate contributions cannot be reconciled with this Court's decision in *Buckley* itself. *Id.*

The Federal Election Commission ("FEC") intervened as a party defendant (JA 29)[2] and shortly thereafter the United States and the FEC (collectively "the Government") moved to dismiss the Complaint for failure to state a claim on which relief could be granted. The district court denied the Government's motion, concluding:

> Mariani has presented facts on which to base a rational argument that the ostensible purposes of a ban on corporate contributions to candidates for federal elective office—eliminating the corruption and appearance of corruption resulting from corporate contributions to individual candidates—is completely undermined by the allowance of "soft money" contributions by corporations. Mariani's argument is rooted in demonstrable facts and extrapolates from existing precedents to argue rationally the conclusion that the ban on corporate contributions cannot withstand constitutional scrutiny.

(App. 189a).

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[2] References to "JA" are to the Joint Appendix filed with the Court of Appeals.

Consistent with its obligations under the certification procedures set forth in 2 U.S.C. § 437h, the district court correctly understood that its next role was to make detailed findings of fact and to certify relevant legal issues to the Court of Appeals for the Third Circuit for its *en banc* consideration. *See* 2 U.S.C. § 437h. Toward that goal, the parties engaged in extensive discovery under the supervision of the district court. Depositions were taken of witnesses and factual testimony offered from a large number of experts, including academics, Members of Congress and representatives from both national political parties. On the conclusion of discovery, the parties filed a "Joint Stipulation of Facts," setting forth 117 stipulated findings. (App. 32a). Four hundred sixty-eight additional proposed findings of fact were submitted on behalf of Mr. Mariani, many of them taken directly from statements of the FEC and witnesses proffered by it in this action and elsewhere. *Id.* The Government submitted 36 additional proposed findings of fact, a number of which were stipulated to by Mr. Mariani. *Id.* In addition, the parties stipulated to the admission in evidence of 279 documents (subject to certain overarching objections asserted by the Government and rejected by the district court). *Id.* Exhaustive briefs were then submitted by the parties dealing with each of the hundreds of proposed findings of fact proffered by the parties. On August 31, 1999, the Court held a fact-finding hearing.

On October 27, 1999, the district court issued its Memorandum Opinion and Order. Noting that the parties were "in remarkable agreement as to the accuracy of an overwhelming majority" of the parties' respective proposed findings, (App. 47a), the court entered 407 detailed findings of fact and rendered 21 of its own "ultimate factual conclusions" based upon the evidence before it, (App. 178a-181a).

The District Court's Findings

The district court's findings are filled with specific details of money sought, money given and advantages obtained by corporate contributors of soft money. Taken as a whole, the findings paint a graphic picture of the devastating effects the current campaign finance regulatory regime has wrought on the political landscape. The court found that soft money—which may be given to political parties in unlimited sums, FOF 45 (App. 65a-66a)—and "issue advocacy"—advertisements, largely funded with soft money, that are "nearly identical to hard money ads," FOF 114 (App. 85a)—"have together eviscerated the contribution limits and disclosure requirements in federal election laws" and "essentially rendered [those limits] meaningless." FOF 407, 398 (App. 178a, 176a). The court's detailed findings portray a statute which limits First Amendment rights in the supposed service of accomplishing significant public ends, but which demonstrably fails even to advance those ends in a material way.

The court's findings demonstrate with precision that, in good part as a result of corporate contributions of over $100,000, soft money totals have grown tremendously in the last two decades. FOF 58 (App. 69a). In 1980, the political parties raised an estimated $19 million in soft money; by 1996, soft money dollars exceeded $260 million; this year the figure will likely exceed $500 million. FOF 51-57 (App. 67a-68a); Affidavit of Alan K. Simpson at ¶ 5 (JA 60).

The district court determined that the largest soft money donations have frequently come from corporations facing pressing issues in Washington. For instance, AT&T and other telecommunications companies donated millions of soft money dollars to both parties at key points during the drafting of telecommunications legis-

lation governing the entry of the local "Baby Bell" telephone companies into the long-distance market. FOF 66, 73-77 (App. 73a-77a). Likewise, pharmaceutical companies, health care insurers and other corporations with an interest in the numerous health care reform initiatives pending during the 1995-1996 election cycle donated millions to both Republicans and Democrats. FOF 66, 80-84 (App. 73a-75a, 78a-79a). *See also* FOF 66-72 (App. 73a-76a) (tobacco industry); 66, 78-79 (App. 73a-75a, 78a) (trial lawyers).

The use of corporate soft money to fund issue advocacy is explored at length in the court's findings. The district court concluded, after considering many examples of issue advocacy, that "[m]ost issue advocacy ads are nearly identical to hard money ads in that they praise or criticize federal candidates by name or feature their likeness," while carefully avoiding engaging in "express advocacy" as defined in *Buckley—i.e.*, urging in so many words that one "vote" for or against a candidate, *see* 424 U.S. at 44—so as to escape federal regulation.[3] FOF 114 (App. 85a); FOF 97, 99-107, 112-13, 115-19 (App. 82a-86a). *See Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897, 914 (2000) (Kennedy, J., dissenting) ("Soft

[3] For example, an issue ad financed by the Republican National Committee that aired repeatedly during the last presidential election cycle criticized President Clinton's first-term tax increases, featured footage of Clinton admitting to having raised taxes "too much," and then urged Clinton to "Support Senator Dole's plan to repeal your gas tax. And learn that actions . . . do speak louder than words." (JA 167). Because the ad did not expressly urge Senator Dole's election, it was not treated as "express advocacy." FOF 158 (App. 96a). Similarly, the Democratic National Committee ran advertisements of its own, contrasting Clinton's positions with those of "Dole/Gingrich" and closing with the statement that "[o]nly President Clinton's plan meets our challenges, protects our values." (JA 196). That too was not taken to be express advocacy and, like the Republican ad summarized above, did not lead to any enforcement efforts by the FEC. FOF 158 (App. 96a).

money may be contributed to political parties in unlimited amounts . . . and is used often to fund so-called issue advocacy, advertisements that promote or attack a candidate's position without specifically urging his or her election or defeat.").

As the district court's findings show, in presidential election years, the two national party committees "are controlled by and operated for the benefit of the parties' presidential nominees." FOF 232 (App. 117a). Large and/or repeated soft money donations made to those committees and related party organizations purchase access at the highest levels. FOF 172-225 (App. 100a-115a). Both the Democratic and Republican parties, for example, hold events aimed at collecting corporate money in return for access to well-placed office-holders. In 1994, major donors to the Democratic National Committee were thus offered the following activities:

- seats on air force one and air force two;
- permission to play on the White House tennis courts;
- seats at private White House dinners;
- admission to Rose Garden ceremonies;
- joining official delegations traveling abroad;
- appointments to boards and commissions; eating at the White House mess;
- visits to and overnight stays in the White House residence;
- seats at the President's weekly radio addresses;
- seats in the White House movie theater; and
- using the President's box at two local theaters.

FOF 257 (App. 123a-124a).

On the Republican side, an initial donation of $100,000 upon joining "Team 100" assured the recipient of "the greatest opportunity possible to meet and talk informally with Party leaders, foreign dignitaries and special guests." FOF 272 (App. 130a). According to the Team 100 Brochure, invited participants to the 1995-1996 meetings included the following:

> Former Presidents Gerald Ford and George Bush, Dan Quayle, Bob Dole, Phil Gramm, Trent Lott, Newt Gingrich, Dick Armey, Lamar Alexander, Richard Lugar, Jack Kemp, Dick Cheney, and other Republican leaders. Past participants include: Connie Mack, Bob Packwood, Alfonse D'Amato, Thad Cochran, Pete Wilson, Bill Paxon, Bill Archer and Susan Molinari.

FOF 274 (App. 131a).[4]

FECA's hard money restrictions have not impeded the ability of corporations and other prohibited donors to purchase such privileges. FOF 180-88 (App. 102a-104a). As the district court found, based on the FEC's own

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[4] The advantages of making large contributions are hardly disguised. In a July 10, 1996 letter, the chairman of the board of Mobile Telecommunication Technologies wrote to a prospective Team 100 member:

> I feel we have a rare opportunity with Haley [Barbour], Trent [Lott], and Thad [Cochran] in the positions they are today.
>
> Ed Lupberger, CEO of Entergy, joined Team 100 earlier this year, and this past Spring I saw Haley escort him on four appointments that turned out to be very significant in the legislation affecting public utility holding companies. In fact, it made Ed a hero in his industry.
>
> If you have been considering this or if there is a chance you might, I feel it significant to Haley and the Senators if you could do this. . . .

FOF 278 (App. 132a).

observation, large soft money donations to party committees "may actually provide a more efficient means of gaining access to legislators and regulators than smaller donations directly to the candidates, since a single large party donation can buy the opportunity to attend party events involving and make connections with many of the party's key office holders." FOF 193 (App. 105a). *See also* FOF 173, 175-76, 192, 194, 197-98, 200 (App. 101a-102a, 105a-107a).

The district court's findings depict a system of "close and complex relationships" between donors, officeholders and party officials, FOF 221 (App. 113a), in which all three groups cooperate to bring about the exchange of soft money for access and influence:

* First, donors "gain access and have their phone calls taken. And access can influence action. . . ." FOF 175 (App. 101a); *see also*, *e.g.*, FOF 173, 189, 195, 201 (App. 101a, 104a, 106a, 107a-108a); *see generally* FOF 208-15 (App. 109a-111a).

* Second, candidates are "acutely aware" of who donates money to their parties. FOF 216 (App. 112a).[5] Having come into contact with donors through this fundraising, elected candidates understand that "all other things being equal, it would be helpful if they cast their votes in a way that helped their party, party committees, and thus these large donors." FOF 220 (App. 113a).

* Third, party officials serve as the intermediaries between donors and candidates or officeholders. FOF 226 (App. 115a).

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[5] What they are not aware of—or even interested in—is whether money donated to them is hard or soft money. See FOF 180 (App. 102a) (recipients of corporate donations perceive "no difference . . . between hard and soft money").

> Party committees have open and reciprocal relationships with the PACs and individuals who give them money, and they openly cultivate relationships between those contributors on the one hand and candidates and officeholders on the other. Money passing through the party committees and spent on behalf of candidates is not cleansed of either the giver's identity or interests. Rather, the parties create opportunities to bring donors and candidates together and therefore provide a degree of access to party donors that is difficult to match through other venues.

Id.; *see also* FOF 227, 231, 242-54, 259-319 (App. 115a-116a, 119a-123a, 125a-149a).

The district court found that under the current regime, large soft money donations can and often do result in a corrupt *quid pro quo*, FOF 330-31 (App. 153a), since (in the words of the FEC) "[l]arge donations to parties can effectively influence federal policy," FOF 332 (App. 153a). In other language of the FEC adopted by the district court, "[v]ery large donations to the party committees, on the order of twenty-five, fifty, or one hundred thousand dollars from one company or individual, have a corrupting influence." FOF 333 (App. 153a); *see also* FOF 336, 337, 369 & 338-39 (App. 154a-155a, 163a).

In addition, the district court determined that the soft money system leads to a result that may be just as harmful as actual corruption: the appearance of corruption. FOF 342-52, 363-69 (App. 156a-158a, 162a-163a). After citing numerous specific examples, the court (quoting the FEC itself) concluded that "[t]he availability of access to officials and candidates in exchange for contributions creates the appearance of corruption" and that "[s]oft money fund-raising by federal officeholders and

national party committees has contributed to a pervasive perception among the general public that current federal political campaign fund-raising practices improperly rely on large donors seeking influence." FOF 345-46 (App. 156a-157a). And quoting the government's expert in this litigation, the court put it as follows:

> The specter of the President, the Speaker of the House, and other high ranking federal policy makers holding private meetings with wealthy individuals and those who represent moneyed interests for the purpose of collecting millions of dollars in large contributions . . . encourages citizens to believe that politicians find ways to cheat the system when raising money for federal campaigns. It also encourages them to believe that their government is responding to special wealthy interests rather than themselves.

FOF 352 (App. 158a); *see also*, *e.g.*, FOF 353-62 (App. 158a-162a).[6]

Based on its extensive survey of the campaign finance landscape, the district court concluded that corporate soft money donations have "the same ability to corrupt and give rise to the same appearance of corruption as would contributions from corporate treasuries to the

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[6] It is telling that the court of appeals, in disparaging the quality of the evidence relied upon by the district court with respect to the appearance of corruption created by the explosion of large soft money donations, made no reference to the FEC's own admissions. (App. 4a, 8a-9a). Instead, the court referred critically (App. 9a) to a single editorial published in the New York Times cited by the district court, *see* FOF 370 (App. 164a), which referred to the now notorious solicitations by the Democratic National Committee of Johnny Chung—solicitations for contributions in return for access to public officials. Why this does *not* provide powerful evidence for the proposition that large soft money donations create the appearance of corruption was not articulated by the court.

campaign committees of candidates for federal elective office." (App. 180a).

Having entered its detailed findings, and in accordance with 2 U.S.C. § 437h, the district court then certified the question of the constitutionality of §§ 441b and 441f to the United States Court of Appeals for the Third Circuit sitting *en banc*.

The Decision of the Court of Appeals

On May 18, 2000, the Third Circuit filed its opinion, upholding both §§ 441b and 441f.[7] Although the court recognized that § 437h required that the district court make findings of fact (App. 4a), it determined that since the district court's findings were "made in a setting outside the traditional adversary crucible," *id.*—*i.e.*, many of the facts had been stipulated to by the plaintiff and the Government—the findings were not entitled to deference by the court of appeals. This erroneous holding is addressed in Point III, below.

Turning to the merits of the constitutional claims, after first agreeing with the district court that plaintiff's challenge to the ban on corporate contributions was not frivolous, the court addressed plaintiff's claim that an outright ban on corporate contributions was inconsistent with *Buckley*'s finding that the ability to make modest campaign contributions furthers important associational interests protected by the First Amendment. After surveying this Court's jurisprudence in the campaign finance context, the court of appeals concluded:

> We are mindful that the flat ban on corporate contributions has never been directly addressed by a holding of the Supreme Court, and that this issue

[7] The court of appeals had subject matter jurisdiction over the appeal under 2 U.S.C. § 437h.

> involves important First Amendment values. Because of the strong implication we draw from [*FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982)], [*FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985)] and [*Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990)], however, we feel compelled to reject Mariani's facial challenge to § 441b(a). It will be for the Supreme Court itself to decide otherwise.

(App. 22a). This ruling of the court of appeals is discussed in point II, below.

Addressing Mariani's claim that § 441b(a) no longer can be said materially to advance its goals in light of the elephantine soft money loophole, the court of appeals ignored most of the hundreds of factual findings of the district court and concluded as a matter of law that it was not required to give deference to them. The court simply ignored the conclusion of the district court, based upon scores of detailed and undisputed findings, that notwithstanding certain differences between hard and soft money, unlimited soft money donations by corporations prevent the total ban on corporate contributions from achieving any of its stated goals. (App. 5a, 25a). Congress, the court held, was constitutionally permitted to "act incrementally" to address perceived abuses. (App. 23a). Accordingly, the court upheld the constitutionality of both §§ 441b and 441f. These holdings of the court of appeals are addressed in point I, below.

REASONS FOR GRANTING THE WRIT

I.

THE IMPACT OF SOFT MONEY ON THE CONSTITUTIONALITY OF SIGNIFICANT PORTIONS OF THE FEDERAL ELECTION CAMPAIGN ACT IS OF PROFOUND IMPORTANCE TO THE DEMOCRATIC PROCESS AND SHOULD BE DETERMINED BY THIS COURT

The soft money driven system in place today exists in large part as a result of the determination in *Buckley* that an entire body of political speech is outside FECA's reach. Corporate speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office" is prohibited under FECA; speech that does not, is not. *See Buckley*, 424 U.S. at 44. And, as *Buckley* made clear, only speech that contains what have now come to be known as "*Buckley*'s magic words"—"Vote for Jones," "Elect Smith" and the like—can, constitutionally speaking, be considered express advocacy. *Id.* at n.52. In so narrowing the reach of FECA in service of the serious First Amendment concerns raised there, the *Buckley* ruling itself created the petrie dish from which soft money sprang.

In the years since, the FEC's efforts to limit the use of soft money for issue advocacy have been repeatedly rebuffed by the lower federal courts, largely on the basis of this Court's decision in *Buckley*. *See, e.g., Maine Right to Life Committee, Inc.* v. *FEC*, 98 F.3d 1 (1st Cir. 1996) (affirming declaratory judgment that FEC regulation defining express advocacy was contrary to FECA as interpreted by *Buckley* and its progeny, and thus beyond the power of the FEC); *FEC* v. *Christian Action*

Network, Inc., 92 F.3d 1178 (4th Cir. 1996), *aff'g* 894 F. Supp. 946 (W.D. Va. 1995) (dismissing FEC enforcement action against nonprofit corporation which ran issue advocacy ads); *FEC* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (remanding with directions to dismiss complaint in FEC enforcement action because committee's pamphlet was merely issue advocacy); *Virginia Society for Human Life, Inc.* v. *FEC*, 83 F. Supp. 2d 668, 676 (E.D. Va. 2000) (holding FEC express advocacy regulation "blatantly unconstitutional" and enjoining FEC from enforcing it); *Right to Life, Inc.* v. *FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998) (granting summary judgment against FEC due to unconstitutional overbreadth of express advocacy regulation); *FEC* v. *National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) (granting summary judgment against FEC on basis that NOW mailings were issue advocacy and thus not subject to corporate contribution ban). Indeed, the Court of Appeals for the Fourth Circuit has recently sanctioned the FEC for continuing to seek to regulate soft money in ways deemed inconsistent with this Court's mandate. *See FEC* v. *Christian Action Network, Inc.* 110 F.3d 1049 (4th Cir. 1997). At the same time, when bills have been introduced in Congress purporting to address the problem, all have been met with the response that such efforts are unconstitutional under *Buckley*.[8]

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[8] *See, e.g.*, 145 Cong. Rec. S12735 (daily ed. Oct. 18, 1999) (Statement of Sen. Allard) ("As the Supreme Court has ruled [in Buckley], political spending equals political expression. Attempting to stop this political expression, however distasteful some might find soft money, is an attempt to stifle activities protected by the Constitution . . . ."); 145 Cong. Rec. S12583 (daily ed. Oct. 14, 1999) (Letter from American Civil Liberties Union to Sen. McConnell, entered into the record by Sen. McConnell in opposition to McCain-Feingold bill) ("[T]he unrestricted use of soft money by political parties and non-party organizations like labor unions has been invited by *Buck-*

A soft money system has thus been created that flourished in 1996, that flourishes today and that encourages the very ills that FECA was designed to prevent. The record in this case is filled with examples of issue ads that carefully avoid *Buckley*'s magic words but are otherwise indistinguishable from highly regulated campaign ads and that are paid for with corporate dollars raised in ever increasing amounts. (JA 163-69, 182-97, 257). It should thus come as no surprise that the district court found as a fact—based on admissions by the FEC itself—that soft money donations "permit parties and donors to do indirectly what the law clearly forbids them to do directly." FOF 403 (App. 177a).

That finding is not a political judgment; it is a juridical determination made by a district court that is consistent with repeated statements of the FEC itself.[9]

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ley . . . ."); 144 Cong. Rec. H4447 (daily ed. June 10, 1998) (Statement of Rep. Scott) ("The *Buckley* v. *Valeo* decision provides that . . . limiting political expenditures is an unconstitutional denial of free speech in violation of the First Amendment."); 144 Cong. Rec. H4460 (daily ed. June 10, 1998) (Statement of Rep. Whitfield) ("*Buckley* v. *Valeo* has made it very clear that free speech is a part, and an integral part, of the political system in America, and that we cannot limit the amount of money spent on these political campaigns."); 144 Cong. Rec. H4464 (daily ed. June 10, 1998) (Statement of Sen. McConnell) ("Another unfairness that we all agree on is the independent expenditure, again a constitutionally protected area of expression, according to the Supreme Court in *Buckley* v. *Valeo*.").

[9] *See* FOF 405 (App. 178a) (quoting FEC Statement of Material Facts in *Republican National Committee* v. *FEC*, No. 98-CV-1207 (WBB) (D.D.C.)) (Large soft money donations "strike at the heart of campaign laws intended to favor small contributions from individuals over piles of cash from wealthy groups."); FOF 406 (App. 178a) (quoting FEC Statement of Facts in *RNC* v. *FEC*) ("The raising and spending of tremendous amounts of soft money, in particular, destroys the basic tenet of the campaign finance law, which is to deter corruption and the appearance of corruption."); FOF 404 (App. 177a) (quoting FEC Notice of Proposed Rulemaking, 63 Fed. Reg. 37722,

Although "broken" legislation may be remedied prospectively by Congress or the FEC, the statutory provisions at issue here are, after all, *criminal* in nature—Mr. Mariani is at risk of being sentenced to prison for scores of years—not to say ones which raise First Amendment issues of the highest magnitude. Thus, it was not even responsive for the Third Circuit to proclaim that "[w]e cannot exchange our robes for togas." (App. 5a). It was simply an abdication of judicial responsibility. If these provisions of the FECA are constitutionally infirm, § 437h requires that they be struck down now.

This Court has identified two distinct interests that have been found compelling enough to justify restrictions of the sort at issue here. In *Buckley* itself, the interest in preventing corruption or the appearance of corruption was found sufficiently compelling to uphold the $1,000 cap on individual campaign contributions considered there. 424 U.S. at 25-29; *Shrink Missouri*, 120 S. Ct. at 905-08. Years later, in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990), the Court pointed to the derivative interest in preventing corporations from unduly influencing the outcome of elections by virtue of their ability to amass immense aggregations of wealth with the help of the corporate form.

However, as *Buckley* held, a campaign financial statute limiting First Amendment interests that does not "provide an answer that sufficiently relates to the elimination of [the perceived] dangers" cannot be sustained. 424 U.S. at 45. That was the basis upon which this Court ultimately held FECA's expenditure limit to be uncon-

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at 37728 (1998)) ("National party committees use large soft money contributions in ways that unavoidably influence federal elections. This is inconsistent with the policy goals of FECA, which seeks to limit corruption and the appearance of corruption . . . .").

stitutional. Having limited the permissible scope of the law to "express advocacy" of the election or defeat of a candidate for federal office, *id.* at 44, the Court then concluded that the statute no longer could be said to materially advance its goals. According to the Court:

> [i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office.

Id. at 45.

Similar rulings have frequently been rendered by this Court in response to other First Amendment challenges. *See Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) (restriction must be narrowly tailored to achieve a compelling end and must "in fact alleviate [the perceived] harms in a direct and material way"); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979) (statute that limits First Amendment rights cannot constitutionally exist if it "does not accomplish its stated purpose"); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (law prohibiting disclosure of alcoholic strength on beer labels, but not, for instance, in advertising, prevented material advancement of the asserted interest in averting so-called "strength wars").[10] Thus,

[10] The Third Circuit correctly asserted the general proposition that Congress is permitted to take partial measures to solve a problem without eradicating it. (App. 23a). Plaintiff's claim, however, is not

even assuming that a flat ban on corporate contributions could survive constitutional scrutiny in the abstract, if the ban on corporate contributions does not accomplish its stated purpose, it cannot be reconciled with the First Amendment.

It is that issue that is central to this petition. The core findings of the district court in this case are both unambiguous and undisputed that large soft money contributions are used "in ways that unavoidably influence federal elections," FOF 404 (App. 177a), that such uses "circumvent the campaign contribution restrictions," FOF 402 (App. 177a) and that the "raising and spending of tremendous amounts of soft money, in particular, destroys the basic tenet of the campaign finance law, which is to deter corruption and the appearance of corruption," FOF 406 (App. 178a).[11] There is thus no basis to conclude that the challenged FECA provisions in fact prevent corruption or the appearance of corruption, *see FEC* v. *National Right to Work Committee*, 459 U.S. 197, 208 (1982) ("*NRWC*"), *Shrink Missouri*, 120 S. Ct. at 905, or prevent corporations from having a distorting effect on the political process, *Austin*, 494 U.S. at 660.

Section 441f fails to survive scrutiny under the First Amendment for the same reason. Its fatal flaw is that it only applies to "contributions." *See* 2 U.S.C. § 441f ("No person shall make a *contribution* in the name of another

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that Congress may not advance its legislative agenda incrementally, but that it may not pass laws restricting protected speech (whether narrowly or broadly) that fail to advance their purported goals. "[W]here important First Amendment interests are at stake [a selective ban] simply cannot be defended on the ground that partial prohibitions may effect partial relief." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 540 (1989).

[11] All these findings, like many others, are rooted in assertions of the FEC itself. *See* FOF 402, 404 & 406 (App. 177a-178a).

person . . . .") (emphasis added). With no exception relevant here, soft money donations are not considered "contributions" for purposes of the applicable provisions of FECA. 2 U.S.C. §431(8). Thus, they are simply exempt from the reach of § 441f altogether.[12]

Because § 441f thus only applies to hard money, corporations and individuals who would otherwise be prohibited from contributing through conduits could do so with impunity by donating soft money, to substantially the same effect as—and in far greater quantities than—if they had given hard money. Thus, because of the same pervasive influence of soft money evidenced by the district court's findings, the conduit provision simply cannot be said to advance the goals of FECA as set forth in *Buckley*, *Austin*, *et al.*

This Court should grant the petition to consider the important issue of whether the soft money explosion has so undermined the effectiveness of §§ 441b and 441f as to render them unconstitutional.

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[12] This distinction was recently underscored by the D.C. Circuit in *United States* v. *Kanchanalak*, 192 F.3d 1037, 1044 n.11 (D.C. Cir. 1999), which recognized that "because of the special definition of contribution in the Act, § 441f prohibits conduit contributions of hard money only."

II.

THIS CASE PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW AS TO WHETHER CORPORATIONS MAY BE TOTALLY BARRED FROM MAKING ANY CONTRIBUTIONS TO CANDIDATES FOR FEDERAL OFFICE

This case presents another question of significant importance, one that the Court of Appeals acknowledged could only be resolved by this Court. If the right to participate in the political process by contributing to a candidate's campaign is one protected by the First Amendment's right of association, as *Buckley* held and this Court's recent decision in *Shrink Missouri* reaffirmed, the total ban on corporate contributions cannot survive constitutional scrutiny.[13]

In considering the $1,000 ceiling on individual contributions at issue in *Buckley*, the Court stressed the fundamental importance of the associational right directly to support the candidate of one's choice.

> [T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association. . . [T]he right of association is a "basic constitutional freedom," *Kusper* v. *Pontikes*, 414 U.S. [51,] 57 [(1973)], that is "closely allied to freedom of speech and a right which, like free

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[13] The Third Circuit suggested that corporations may contribute to candidates indirectly through political action committees. (App. 19a, 21a). But FECA only allows a corporation to establish a PAC so long as no corporate funds whatsoever are contributed to it, 2 U.S.C. § 441b(b)(4)(A)(i), and therefore corporations are completely barred from themselves making contributions, directly or indirectly, to campaigns.

> speech, lies at the foundation of a free society." *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960). In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP* v. *Alabama*, *supra*, 357 U.S. at 460-461.

Buckley, 424 U.S. at 24-25; *see Shrink Missouri*, 120 S. Ct. at 911 (Breyer and Ginsburg, JJ., concurring) ("Through contributions the contributor associates himself with the candidate's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the votes of similarly minded voters."); *id.* at 918 (Thomas and Scalia, JJ., dissenting) ("Through contributing, citizens see to it that their views on policy and politics are articulated.").[14]

Applying such scrutiny, the *Buckley* Court concluded that the interests in deterring corruption and the appearance of corruption were sufficiently advanced by the $1,000 ceiling to justify the restriction. By permitting individual donors the opportunity to register their political preferences in a "substantial" way—by the making of a $1,000 contribution—associational rights were protected while, at the same time, serious threats of corruption were deterred. *Id.* at 24-29; *see also Shrink Missouri*, 120 S.Ct. at 905-908 (upholding similar Missouri contribution limits).

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[14] The dissenting opinions in *Shrink Missouri* of Justices Kennedy, Thomas and Scalia all urged that *Buckley* itself be reconsidered because it provides insufficient protection of First Amendment interests. *See* 120 S. Ct. at 914 (Kennedy, J. dissenting); *id.* at 916 (Thomas and Scalia, JJ., dissenting). *See also id.* at 913-14 (Breyer and Ginsburg, JJ., concurring) (urging reconsideration of *Buckley* if it "denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance").

In its decision in this case, the Third Circuit acknowledged that *Buckley* "seems to leave open the question whether an outright ban on campaign contributions—such as that found in § 441b(a)—would pass constitutional muster." (App. 18a). Indeed, the court specifically found that the ban "ha[d] never been directly addressed by a holding of the Supreme Court," (App. 22a), and that petitioner's challenge to the provision sought to vindicate "important First Amendment values," *id.* Nonetheless, the Court felt "compelled" to reject that challenge based on an "implication" drawn from *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"), *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) ("*NCPAC*") and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), concluding: "It will be for the Supreme Court itself to decide otherwise." *Id.*[15]

We urge the Court to do just that. The Court in *Buckley* found that because the expressive value of a contribution lies in the act of contributing rather than the amount given, the quantity of a contribution lacked constitutional significance. Therefore, it held that banning contributions above the $1,000 mark was permissible. In the very same breath, however, it acknowledged "the symbolic expression of support evidenced by a contri-

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[15] As the court of appeals implicitly recognized, *NRWC*, *NCPAC* and *Austin* did not address the constitutionality of a flat ban on corporate contributions. (App.20a). In *NCPAC*, the Supreme Court upheld a $1,000 limit on political committee expenditures in support of candidates who have elected to accept public financing. In *NRWC*, the Court held constitutional a statute requiring non-stock corporations or membership organizations to solicit contributions only from their members. *Austin* dealt with an expenditure ban; the argument raised here was neither raised by the parties nor addressed by the Court. Each case was decided at a time when soft money had not inundated the campaign system and in none was the impact of soft money even raised.

bution." *Buckley*, 424 U.S. at 21. Thus, while a limit of $1,000 struck an acceptable balance between individual rights and the state interest—providing the giver the opportunity to convey a symbolic message while curtailing the danger of corruption inherent in large contributions—a limit of *zero* involves no such balancing at all.

Moreover, in evaluating the government's interest in deterring corruption and the appearance of corruption, the Court made clear that it was the fear of "*large* campaign contributions" that was directly advanced by the $1,000 ceiling. *Id.* at 28 (emphasis added). That ceiling, the Court said, permitted contributors "to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.*

Finally, in declining to credit (first in *Buckley* and later in *Shrink Missouri*) appellants' claim that $1,000 was too low a number to afford a meaningful right to political association, the Court emphasized that "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30. A ban on *any* contributions rather than merely large ones is surely a "difference in kind."

The Court should accordingly grant the petition to consider the important issue of whether the First Amendment requires that, at the very least, modest corporate contributions be permitted.

III.

THE THIRD CIRCUIT'S DECISION DEPARTS FROM WELL-ESTABLISHED PRECEDENT OF OTHER COURTS OF APPEALS ON THE IMPORTANT ISSUE OF WHETHER FACTUAL FINDINGS OF A DISTRICT COURT ARE ENTITLED TO DEFERENCE IN A CONSTITUTIONAL CHALLENGE UNDER SECTION 437h

As the court of appeals acknowledged, § 437h of FECA required the district court to make detailed findings of fact and certify to it relevant issues of law. (App. 8a). This procedure is mandated by the statute itself and by well-established case law. Indeed, it is precisely the procedure followed in *Buckley* itself. *Buckley* v. *Valeo*, 519 F.2d 817, 818 (D.C. Cir. 1975).

From there, however, the court of appeals ignored all established precedent by all but discarding the district court's exhaustively considered and articulated findings and declaring that its "review of the District Court's findings . . . is not deferential." (App. 4a). That determination stands alone in the history of § 437h challenges.

When the *Buckley* case was first filed, the district court immediately certified the entire proceeding to the circuit court without finding facts or certifying questions. *Buckley* v. *Valeo*, 387 F.Supp. 135 (D.D.C. 1975). The D.C. Circuit subsequently remanded the case with the following instructions:

1. Identify constitutional issues in the complaint.
2. Take whatever may be necessary in the form of evidence. . . .
3. Make findings of fact with reference to those issues.

4. Certify to this court constitutional questions arising from steps 1, 2, and 3.

Buckley v. *Valeo*, 519 F.2d at 818. The district court carried out this directive, *see Buckley* v. *Valeo*, 519 F.2d 821, 903 (D.C. Cir. 1975), and both the D.C. Circuit and this Court relied on the district court's factual findings in evaluating the merits of the claims, *see id.* at nn. 22, 24-26, 30-34, 36-38, 105-06, 113-16, 118-19, 154; 424 U.S. at nn. 20-21, 23, 27-28, 34-37, 39-40.

This Court has previously determined that district court fact-finding is "required" by § 437h, *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982) ("*Bread PAC*"), and other circuit courts have routinely followed the approach taken in *Buckley* in deciding such cases, *see Khachaturian* v. *FEC*, 980 F.2d 330, 331-32 (5th Cir. 1992) (en banc) (per curiam); *International Ass'n of Machinists and Aerospace Workers* v. *FEC*, 678 F.2d 1092, 1097 (D.C. Cir. 1982) (en banc) (per curiam), *aff'd*, 459 U.S. 983 (1982); *FEC* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 47 (2d Cir. 1980) (en banc) (per curiam); *Bread PAC*, 591 F.2d 29, 36 (7th Cir. 1979). The very point of requiring district courts to make findings of fact is "to allow the en banc [circuit] court to decide the constitutional issues." *Khachaturian*, 980 F.2d at 331. Thus, in *Bread PAC*, after remanding to the district court for fact-finding and certification of issues, the Seventh Circuit paid great deference to the lower court's findings (both as to stipulated facts and otherwise), stating that "[t]heir correctness is not before us." 635 F.2d 621, 625 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982).[16]

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[16] The Third Circuit's approach also is at odds with Federal Rule of Civil Procedure 52(a), which requires district courts to enter findings of fact and conclusions of law in all non-jury actions and states that "[f]indings of fact, whether based on oral or documentary

The Third Circuit's departure from settled precedent appears to be rooted in its fallacious conclusion that since many of the facts had been stipulated to, the district court's findings could be ignored as they had been "made in a setting outside the traditional adversary crucible." But reliance on stipulated facts is commonplace in § 437h determinations,[17] and there is surely no basis for affording less weight to those facts than to those determined by district courts after resolving disputes of the parties.[18]

This Court should grant the petition to address the important question of the appropriate standard of review in cases instituted under § 437h.

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evidence, shall not be set aside unless clearly erroneous . . . ." *See also Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-75 (1985) (rejecting theory that "an appellate court may exercise *de novo* review over findings not based on credibility determinations").

[17] *See, e.g., Buckley*, 519 F.2d at 903; *NCPAC*, 470 U.S. at 483; *Bread PAC*, 635 F.2d at 625; *International Ass'n of Machinists*, 678 F.2d at 1097.

[18] That the Third Circuit also refused to defer to the district court's fact-finding on matters that had been "disputed" (App. 8a), well illustrates the unwillingness of the court to defer at all to the district court's fact-finding. If the district court cannot take account of undisputed facts and cannot resolve disputed factual issues, what findings can it make?

CONCLUSION

The petition for a writ of certiorari should be granted.

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